



**International Covenant on
Civil and Political Rights**

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Chair: Ms. Jelić (Vice-Chair)

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Ms. Jelić (Vice-Chair) took the Chair.

The meeting was called to order at 10.05 a.m.

Organizational and other matters, including the adoption of the report of the Working Group on Communications (continued)

*Draft general comment No. 36 on article 6 of the Covenant (Right to life)
(continued) (CCPR/C/GC/R.36/Rev.4)*

1. **The Chair** invited the Committee to resume the second reading of its draft general comment No. 36 on article 6 of the International Covenant on Civil and Political Rights (Right to life), beginning with paragraph 14.

Paragraph 14

2. **Mr. Shany** (Rapporteur for the general comment) said that the final sentence of paragraph 14 should be amended to say that States parties should not resort to the use of "less-lethal weapons" in situations of crowd control that could be addressed through less harmful means, especially situations involving the exercise of the right to peaceful assembly.

3. *Paragraph 14, as amended, was adopted.*

Paragraph 15

4. **Mr. Shany** said that paragraph 15 had been introduced to clarify the relationship between the provisions in the Optional Protocol to the Covenant concerning the receipt and consideration of communications from individuals claiming to be victims of rights violations and the broader set of rights and obligations set out under the Covenant. Although some Committee members and States parties had previously expressed concern that the wording of the paragraph would create a very open-ended right to bring cases under the Optional Protocol, there had been no intention to propose a change to the relevant rules of standing traditionally applied under the Optional Protocol.

5. Accordingly, and in view of the comments submitted by States parties and other stakeholders on the draft document adopted on first reading, the first sentence could be amended to refer to "obligations to respect and ensure the right to life and to provide effective remedies to victims of violations of the right to life". In line with the proposals of the Governments of Canada and the Netherlands, the references to article 1 of the Optional Protocol appearing in square brackets should be retained in order to underscore the fact that the Optional Protocol was somewhat more restrictive in scope, but, as proposed by the Government of Portugal and in view of the issue of attribution, the word "directly" could be deleted. Amnesty International, which was generally not in favour of the paragraph because it felt that it could be construed as restricting the right of access, had proposed that the first sentence should be modified to refer to effective remedies. In addition, the Government of the Netherlands had proposed that the language could be amended to specify that it was necessary for individuals claiming to be victims of a violation to show that their rights had been violated by acts or omissions attributable to the States parties to whose jurisdiction they were subject. Those changes would cover both direct and indirect violations of the right to life by States parties.

6. **Mr. de Frouville** said that the language used in the paragraph was restrictive in scope and that it was inappropriate to include a definition of the term "victim" under the Covenant and the Optional Protocol in a general comment on the right to life, as doing so would restrict the access of victims to redress under the Optional Protocol. Moreover, the Committee should retain flexibility in terms of its ability to characterize the concept of victimhood. The paragraph would limit the Committee's ability to consider article 1 of the Optional Protocol in the light of any relevant developments that had occurred in domestic jurisprudence since its adoption, as had taken place in the cases of *E.H.P. v. Canada* (CCPR/C/17/D/67/1980) and *Toonen v. Australia* (CCPR/C/50/D/488/1992).

7. **Mr. Heyns** said that the paragraph could be misinterpreted in a way that restricted the application of the right to life. There was reason to believe that the paragraph should be

omitted altogether but, if it were to be retained, it should be rephrased to make it even more clear that the requirements for qualifying as a victim were specific to the procedures used by the Committee and did not apply to domestic courts.

8. **Mr. Fathalla** said that the paragraph could be omitted but that, if it were retained, the first sentence should be redrafted in order to clarify the link between State party obligations and the duty to provide effective remedies.

9. **Ms. Kran** said that she wished to associate herself with the comments made by Mr. de Frouville, Mr. Heyns and Mr. Fathalla. Extreme care must be taken in summarizing the admissibility criteria applied by the Committee in some past cases and in considering how that might impact domestic protections in terms of the justiciability of individual claims in some national jurisdictions. That could be of particular importance in cases involving, for example, homelessness and its serious implications for health. In view of the interdependence and indivisibility of all human rights, it was essential to maintain flexibility in applying such criteria and, for that reason, she was in favour of deleting the paragraph.

10. **Mr. Politi** said that it was important to emphasize that the paragraph, if retained, referred solely to the competence and activities of the Committee in order to forestall restrictive interpretations of the rights of victims by domestic courts. However, it would be preferable to delete the paragraph entirely.

11. **Ms. Cleveland** said that her understanding of the rationale for including the paragraph was that prior discussions had focused on the need to reassure States parties that the general comment would not alter the scope of the right to bring an individual claim under article 1 of the Optional Protocol. If the paragraph were to be retained, it would be important to make it clear that its contents were simply a statement of the Committee's jurisprudence, rather than an attempt to create a special standard for article 6. The paragraph could also be rephrased to state that alleged victims must claim, rather than show, that their rights were affected by acts or omissions attributable to States parties.

12. **Mr. Shany** said that he concurred with the view that the paragraph was not a general comment on the Optional Protocol and thus should not be retained. He did not concur, however, with two of the other reasons given for its removal: that it would send the wrong message to domestic jurisdictions, and that it would somehow "fix" the Committee's jurisprudence. In fact, the paragraph did nothing more than to provide some reassurance to States parties that the Committee was not changing its approach to victimhood.

13. After a discussion in which **the Chair, Mr. de Frouville, Mr. Heyns, Ms. Cleveland, Ms. Brands Kehris, Mr. Koita and Mr. Politi** took part, **the Chair** said that she took it that a consensus had been reached by the Committee members to delete the paragraph.

14. *Paragraph 15 was rejected.*

Paragraph 16

15. **Mr. Shany** said that the arbitrary deprivation of life was a relative concept. The purpose of paragraph 16 was to introduce the notion that the right to life — as important as it was — was not absolute and that there were certain, very limited, circumstances under which the arbitrary deprivation of life would not constitute a violation of article 6 of the Covenant. The concept of arbitrariness was key in that regard and was subsequently elaborated upon in paragraph 18.

16. The Government of Portugal had found that the first sentence was a source of some confusion. That sentence could be deleted, as it was more stylistic than substantive. With regard to the last sentence, the International Commission against the Death Penalty had proposed that the language should be altered to refer not only to countries that had not ratified the Second Optional Protocol to the Covenant but also to those that were not parties to other international instruments providing for the abolition of the death penalty.

17. **Mr. Fathalla** said that a reference to other treaties should be avoided as the paragraph specifically addressed States parties to the Covenant.

18. **Mr. Heyns** said that it would be useful to retain the first sentence in order to refute the misconception that the right to life was absolute. Moreover, it would be useful to introduce an additional sentence in paragraph 16 or 18 to clarify the fact that the deprivation of life was considered arbitrary when it was impermissible under international law or under more protective domestic standards. The sentence to that effect that appeared in the African Union's general comment No. 3 on the African Charter on Human and Peoples' Rights might serve as a point of reference.

19. **Mr. de Frouville** said that paragraph 16 weighed down the text and did not serve any specific purpose, for it simply introduced ideas that would be expanded upon in later paragraphs.

20. **Ms. Kran**, agreeing with the points made by Mr. Heyns, said that the definition of arbitrary deprivation of life that he had proposed could be incorporated into paragraph 18, since it dealt with the notion of arbitrariness.

21. **Ms. Cleveland** said that she, too, was in favour of retaining the first sentence of paragraph 16. She also supported the proposal to include a reference, in the final sentence, to other international instruments that restricted the application of the death penalty. The existing wording implied that States that had not ratified the Second Optional Protocol were limited only by the standards set forth in article 6 (1) of the Covenant, which was not the case if those States were parties to another relevant international instrument.

22. **Ms. Brands Kehris** said that some of the concerns that had been raised could be addressed by reordering the first few paragraphs of section II. She was not convinced that the definition of arbitrariness proposed by Mr. Heyns would add a great deal to the text.

23. **Mr. Santos Pais** said that he agreed with the points made by Ms. Kran, Mr. Heyns and Ms. Cleveland.

24. **Mr. Shany** said that it would make sense to incorporate the explanation of arbitrariness proposed by Mr. Heyns into a later paragraph. He was not inclined to revisit the structure of section II, and he did not agree that paragraph 16 weighed down the text; on the contrary, it was an introductory paragraph that helped readers to situate themselves in the text.

25. There seemed to be a general consensus that the first sentence of the paragraph should be retained, but the Committee had not yet decided whether to include a reference, in the final sentence, to other international instruments that restricted the application of the death penalty, as had been proposed by Amnesty International.

26. **Mr. Politi** said that it was important to include such a reference, so as to avoid any implication that some States could apply the death penalty for crimes other than the most serious crimes.

27. **Mr. de Frouville** said that he was not sure which international instruments were relevant in that context, other than the Vienna Convention on Consular Relations, to which there was already a reference in paragraph 46 of the draft general comment.

28. **Mr. Shany** said that relevant international instruments included Protocols Nos. 6 and 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms, concerning the abolition of the death penalty.

29. **The Chair** said that she took it that the Committee wished to retain the first sentence of the paragraph, to include a reference to other international instruments that restricted the application of the death penalty and to adopt paragraph 16, as amended.

30. *Paragraph 16, as amended, was adopted.*

Paragraph 17

31. **Mr. Shany** said that paragraph 17 dealt with the interplay between the requirement that the right to life should be protected by law and the requirement that no one should be arbitrarily deprived of life.

32. The Russian Federation had objected to the words "a trial conducted in violation of domestic laws" on the grounds that a trial could not be considered to constitute a violation of domestic law because the verdict could be overturned on appeal. He proposed replacing "trial" with the more comprehensive term "legal proceedings" in order to address that concern.

33. The International Commission against the Death Penalty had questioned the use of the word "generally" in the final sentence. That word had been used to convey the fact that some minor technical violations of criminal procedure would not affect the outcome of proceedings and that a sentence handed down in such a case would therefore not necessarily be arbitrary. In order to clarify the notion of arbitrariness as proposed by Mr. Heyns, the phrase "life-protecting laws" could be replaced with "life-protecting domestic or international laws" so as to make it clear that violations of international law could render the deprivation of life arbitrary in nature.

34. **Ms. Cleveland** said that it had been pointed out that paragraph 17 was not consistent with paragraph 11 of the Committee's general comment No. 35 on article 9 of the Covenant (Liberty and security of person), which stated that arrests or detentions could be in violation of the applicable law but not arbitrary, or legally permitted but arbitrary, or both arbitrary and unlawful. Paragraph 17, on the other hand, implied that any deprivation of life that lacked a legal basis was arbitrary in nature.

35. **Mr. de Frouville** proposed amending the wording of the second sentence to convey the idea that the concepts of unlawfulness and arbitrariness overlapped only partially, inasmuch as deprivation of life could be in violation of the applicable law but not arbitrary, or legally permitted but arbitrary, or both arbitrary and unlawful, but that a deprivation of life that lacked a legal basis was also arbitrary.

36. **Mr. Heyns** said that replacing "life-protecting laws" with "life-protecting domestic or international laws" would do little to clarify the notion of arbitrariness.

37. **Mr. Shany** said that the wording of paragraph 17 did not mirror that of general comment No. 35 on article 9 of the Covenant (Liberty and security of person) because articles 6 and 9 of the Covenant were not worded in precisely the same way. He had sought to convey the idea that the concepts of unlawfulness and arbitrariness overlapped only partially by using qualifiers such as "as a rule" and "generally"; the distinction between the two was further emphasized in paragraph 18 of the draft.

38. **Mr. de Frouville** said that the word "generally" was vague and did not help to convey the distinction between the two concepts.

39. **Mr. Shany** proposed replacing "the two requirements overlap" with "the two requirements partly overlap".

40. **Ms. Cleveland**, endorsing Mr. Shany's suggestion, proposed replacing "is, as a rule, arbitrary in nature" with less categorical wording, such as "can be arbitrary in nature".

41. **Mr. Shany** said that the removal of "as a rule", as proposed by Ms. Cleveland, would dilute the sentence.

42. **The Chair** said that she took it that the Committee wished to replace "trial" with "legal proceedings" and "the two requirements overlap" with "the two requirements partly overlap".

43. *Paragraph 17, as amended, was adopted.*

Paragraph 18

44. **Mr. Shany** said that the reference to the notion of "arbitrariness" also appeared in general comment No. 35. In the present paragraph, it was applied in regard to the use of lethal force in self-defence. Although the Governments of France and Poland had expressed concern over the inclusion of "warnings", he deemed the reference useful and supported its retention. The Government of the Netherlands had enquired whether the reference to "private property" in the last sentence could be construed as also covering government property, which it could not. While the Government of the Russian Federation had

proposed equating the notions of "arbitrariness" and "unlawfulness", the Committee's jurisprudence drew a clear distinction between the two. The Government of the United States of America had recommended that the Committee should frame its recommendations as best practice, rather than using imperative terms. He was, however, disinclined to heed that request, as the application of the right to life in the context of the use of lethal force in law enforcement must not be left to States' discretion.

45. The International Commission of Jurists (ICJ) and the American Civil Liberties Union (ACLU) had requested that the word "reasonable" should be removed. ACLU had also requested the deletion of the phrase "as far as possible" so as to clarify that the use of force must always be directed exclusively against the attacker. While he did not object to the proposal, it should be noted that the reference, as it stood, concerned the intention of the person exercising self-defence to direct the use of force against the attacker only, although another person might be hurt accidentally. Amnesty International had requested a more explicit reference to paragraph 9 of the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (1990). That organization had also requested the deletion of all references to "non-lethal" and their replacement with the words "other alternatives" or "less-lethal alternatives". There had also been a proposal to add the word "potentially" before "lethal force".

46. In view of the foregoing, he proposed that the first two sentences and the last sentence should remain unaltered but that the third sentence should be amended to read:

"In order not to be qualified as arbitrary under article 6, the application of potentially lethal force by a person acting in self-defence, or by another person coming to his or her defence, must be necessary in view of the threat posed by the attacker; it must represent a method of last resort after non-lethal alternatives, including warnings and non-lethal neutralization, have been exhausted or deemed inadequate ... the force applied must be carefully directed only against the attacker; and the threat responded to must be extreme, involving imminent death or serious injury."

47. **Mr. Muhumuza** said that the word "domestic" in the first sentence did not change the substance of that sentence and should be deleted.

48. **Ms. Cleveland**, supporting the proposed amendments, noted that the word "deliberate" in the last sentence qualified the use of lethal force for law enforcement purposes. As it was used nowhere else in the paragraph, it might best be deleted.

49. **Mr. Heyns** said that it was important to bear in mind that general comments must be user-friendly. Reflecting on the logical structure of the draft, he had noted that paragraph 16 contained definitions of the right to life and arbitrary deprivation of life, that paragraph 17 addressed issues pertaining to the legal basis of deprivation of life, and that paragraph 18 concerned the right to life in the context of self-defence. It might thus be preferable to move the first two sentences of paragraph 18, which defined the notion of "arbitrariness", to paragraph 16. Paragraph 18 would then commence with the words: "In order not to be qualified as arbitrary ...".

50. He supported the proposal to insert the word "potentially" before "lethal force" in the second sentence and to delete the word "reasonable", which could be replaced with "strictly". He also supported the deletion of the phrase "as far as possible"; although bystanders might be affected, the lethal force must never be directed at anyone but the attacker. The reference to "private property" could be replaced with a more general reference to "property".

51. **Mr. de Frouville**, supported by **Ms. Kran**, said that the Committee must guard against excessive detail that might undermine the clarity of the document and give way to overly narrow interpretations. He supported the proposals to replace the term "reasonable" with "strictly necessary" and delete "extreme gravity". The phrase "the amount of force applied cannot exceed the amount strictly needed for responding to the threat" was redundant, as the idea was already contained in the concept of proportionality in the previous sentence and could therefore be deleted.

52. **Mr. Santos Pais** said that he supported the proposed amendments; the decision whether to move the first two sentences to paragraph 16 should be left to the rapporteur.

53. **Ms. Kran** proposed including the words "to life or serious bodily harm" after "intended to address threats" in the last sentence.

54. **Mr. Politi** said that he had reservations about the proposal to move the first sentence to paragraph 16. There was merit in retaining the definition of the notion of arbitrariness at the beginning of paragraph 18.

55. **Mr. Shany** said that he could go along with the proposal to delete the word "domestic" in the first sentence or to replace it with the wording used in general comment No. 3 on the African Charter on Human and Peoples' Rights. He did not support the proposal to move the first two sentences to paragraph 16 because doing so would disrupt the logical structure of the document, which was based on the structure of article 6 of the Covenant. He supported the proposals to replace the notion of reasonableness with the words "strictly necessary", delete the term "as far as possible", and replace "the threat responded to must be extreme, involving imminent death ..." with "the threat responded to must involve imminent death ...". The word "deliberate" in the final sentence could be deleted. The reference to private property should be retained, in particular in the light of the concerns raised by the Government of the Netherlands.

56. **Ms. Brands Kehris** said that the reference to extreme gravity should be retained.

57. **The Chairperson** suggested that Mr. Shany should prepare a revised version of paragraph 18 for circulation to the Committee for its consideration at a future meeting.

58. *It was so decided.*

The meeting was suspended at 11.55 a.m. and resumed at 12.15 p.m.

Paragraph 19

59. **Mr. Shany** said that the Government of the Russian Federation had taken issue with what it perceived as the binding nature of the requirements set forth in paragraph 19, noting that neither the Code of Conduct for Law Enforcement Officials nor the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (1990) were legally binding instruments. The Government of the United States had expressed similar concerns. However, in his view, the repeated use of the word "should" in reference to the requirements set forth in paragraph 19 attested to their non-binding nature and was sufficiently clear. ACLU had requested that the text should be amended to clarify that the obligation to prevent arbitrary deprivation of life applied to all State officials, including those in law enforcement and other security agencies. He proposed replacing the term "law enforcement organs" with "law enforcement officials, including soldiers charged with law enforcement missions" and "agents" with "officials", both in paragraph 19 and in paragraph 14, in order to accommodate that concern. By the same token, the word "police" in the second sentence should be deleted. He was also in favour of incorporating Amnesty International's proposal to replace the term "non-lethal means" by "less-lethal means".

60. If those proposals were acceptable to the Committee, the relevant portion of paragraph 19 would then be amended to read:

"States parties are expected to take all necessary measures intended to prevent arbitrary deprivations of life by their law enforcement officials, including soldiers charged with law enforcement missions. [...] mandatory reporting and review and investigation of lethal incidents, and other life-threatening incidents, and the supplying of forces responsible for crowd control with effective 'less-lethal' means and adequate protective equipment in order to obviate their need to resort to lethal force."

61. *Paragraph 19, as amended, was adopted.*

Paragraph 20

62. **Mr. Shany**, supported by **Mr. Politi**, said that, on the basis of technical observations submitted to the Committee, he recommended replacing "may continue to apply the death penalty" with "are not legally barred from applying the death penalty" in order to more accurately reflect the Committee's position. The Government of the United States had commented that protocols for administering new drugs should be based on best practices rather than legal obligations, but the regulation of activities that could violate the right to life was a legal requirement by virtue of article 6 of the Covenant. The Government of the Netherlands had proposed that the paragraph should be divided into two subparagraphs, one of which should deal specifically with the death penalty; however, in his view, it was valid and, indeed, useful to discuss the death penalty within the broader context of the safeguards that should be provided for by law.

63. **Mr. de Frouville** said that the paragraph could be omitted altogether, given that the first sentence repeated elements of paragraph 17, the aspects of the death penalty discussed in the second sentence would be covered in more detail later on in the text, and the examples given in the final two sentences of activities that could result in the deprivation of life were incongruous.

64. **Mr. Santos Pais** said that the paragraph merited inclusion because it helped laypeople to understand the rationale for article 6 of the Covenant. Perhaps a third example could be provided to make the contrast between the existing two examples less stark.

65. **Mr. Heyns** said that he wished to know whether the Committee planned to mention the intentional lethal use of firearms, as referred to in the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, either in paragraph 20 or elsewhere in the general comment.

66. **Mr. Politi** said that he wondered whether the same reference to "other international instruments providing for the abolition of the death penalty" that had been inserted in paragraph 16 should be added to paragraph 20 as well.

67. **Mr. Shany** said that he opposed removing the paragraph. The first sentence helped to differentiate the Covenant from the European Convention on Human Rights, which specified the permissible grounds for deprivation of life; the second sentence addressed the death penalty in the specific context of the arbitrary deprivation of life; and the examples cited in the final two sentences illustrated that certain activities which were not usually associated directly with the deprivation of life could have a right-to-life dimension.

68. Referring to other treaties on the abolishment of the death penalty could prove cumbersome in the context of paragraph 20, since it specifically cited article 6 (2), (4) and (5) of the Covenant; in order to avoid any doubt, the words "are not legally barred" could be changed to "are not legally barred under the Covenant". In the interests of brevity, the examples could be deleted.

69. **Mr. Muhumuza** said that the paragraph should also take account of situations where death was caused without the use of weapons.

70. **Mr. Shany** said that paragraphs 18 and 19, as redrafted, would address Mr. Muhumuza's concerns.

71. **The Chair** said that she took it that the words "may continue to apply the death penalty" should be replaced with "are not legally barred under the Covenant from applying the death penalty" and that the words "conditions for use of lethal weapons by the police or" should be removed.

72. *Paragraph 20, as amended, was adopted with minor drafting changes.*

Paragraph 21

73. **Mr. Shany** said that the Governments of Denmark and the United Kingdom had suggested amending the first sentence to state that the deprivation of life through acts or omissions that violated provisions of the Covenant other than article 6 "may be arbitrary". However, given the importance of that principle, he considered the current wording — "is,

as a rule, arbitrary" — to be entirely appropriate. The Government of Japan had proposed that the paragraph should establish a clear cause-and-effect relationship between such violations and the deprivation of life; however, that could prove to be very difficult in practice, particularly in the case of due process violations. Lastly, while the Government of the Russian Federation had suggested that only courts could determine arbitrariness, the Committee had been doing so for a long time, and with good reason.

74. *Paragraph 21 was adopted.*

Paragraph 22

75. **Mr. Shany** said that paragraph 22 served as an introduction to the discussion of the two sources of the positive obligation to protect, by law, the right to life and the general duty to protect the right to life, namely, article 6 and article 2 (1), respectively. The two obligations complemented one another, as one focused on the duty to introduce a legal framework of protection and the other on the duty to take appropriate measures of protection.

76. With respect to the comments received on that paragraph, he supported the proposal made by the Governments of Australia and the United Kingdom to amend the paragraph slightly to refer to the obligation of States parties to protect life only from "all reasonably foreseeable threats" rather than "all foreseeable threats", which was too far-reaching. The Russian Federation had proposed alluding to the duty of States to define a list of illegal actions, but such obligations were already set out later in the general comment; for instance, paragraph 24 referred to the obligation of States parties to enact criminal prohibitions on all forms of arbitrary deprivation of life. He disagreed with the proposal made by the Government of the United States to change the title of part III of the general comment from "The Duty to Protect Life" to "Rights shall be protected by law", which appeared to reflect an overly narrow understanding of the scope of the positive obligations incumbent upon States parties. The Government of the United States had also commented that paragraph 22 did not state on what authority States parties were obliged to establish a legal framework and to protect the right to life. While that was true, that obligation was so fundamental to the Committee's reading of the Covenant that it did not seem necessary to refer to a specific article in the context of paragraph 22.

77. **Mr. de Frouville**, supported by **Mr. Shany**, said that, since the first sentence was intended to give effect to the right to life, it might be appropriate to incorporate the language used in article 2 (2) of the Covenant. The third sentence should not refer specifically to "legal measures", since the measures taken by States parties to protect life from foreseeable threats should go beyond a mere legal framework.

78. **Mr. Heyns** proposed that "legal measures" should be replaced with "legal and other measures".

79. **Mr. Shany** said that paragraph 22 deliberately emphasized the protection of the right to life under law: the general duty to protect life was dealt with elsewhere in the general comment.

80. **The Chair** said that the Committee would continue to discuss the wording of paragraph 22 at the next appropriate meeting.

The meeting rose at 1.05 p.m.